FILED

MAY 27 2003

CATHY A. CATTERSON
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AURELIO CERVANTES MORALES, an individual,

Plaintiff - Appellant,

v.

CITY OF LOS ANGELES, A CALIFORNIA MUNICIPAL CORPORATION; ANTONIA DIMARCO-SERNA, an individual; BENNIE BOATWRIGHT, an individual; STAN NELSON, an individual; GREGORY D. BECKLEY, an individual; JOHN CHAVEZ, an individual,

Defendants - Appellees.

No. 02-55649

D.C. No. CV 98-03939 CAS

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted April 7, 2003
Pasadena, California

Before: PREGERSON, TASHIMA, and CLIFTON, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

Plaintiff Aurelio Cervantes Morales ("Cervantes") appeals the district court's grant of summary judgment in favor of defendants in his 42 U.S.C. § 1983 action alleging that police officers and the City of Los Angeles violated his rights by conspiring to fabricate evidence and suborn perjury in his state court action for false arrest. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Cervantes contends that he was precluded from obtaining a fair trial in his state court proceedings because Officer Gregory Beckley fabricated arrest records and lied about the time he arrived at the scene of Cervantes' arrest. In California,"[f]raud by a party will not undermine the conclusiveness of a judgment unless the fraud was extrinsic, *i.e.*, it deprived the opposing party of the opportunity to appear and present his case." Eichman v. Fotomat Corp., 197 Cal. Rptr. 612, 614 (Ct. App. 1983). Concomitantly, the suppression of evidence is classified as intrinsic fraud and therefore is not a ground for invalidating the judgment. Id. at 614-15. In this case, as in Eichman, diligent discovery would have unearthed the evidence that Cervantes asserts defendants concealed. Accordingly, Cervantes has had a full and fair opportunity to try his case despite any evidence of intrinsic fraud. Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 516-17 (Cal. 1998) ("[W]hen [the aggrieved party] has a trial, he must

be prepared to meet and expose perjury then and there. . . . If, unfortunately, he fails, being overborne by perjured testimony . . . he is without a remedy.").

Moreover, the issue of fabrication was actually litigated. The state trial court stated: "I'll make a finding right now that the officer did not fabricate any evidence." The California Court of Appeal also found that Cervantes' assertion was "unsupported by the evidence or any inferences from the evidence." Accordingly, Cervantes litigated the fabrication issue in state court and is now precluded from raising the same issue in federal court.[1] See Calvert v. Huckins, 109 F.3d 636, 638 (9th Cir. 1997). We also conclude that, because Cervantes makes no showing that his rights were violated as a result of an "official policy or custom," the City of Los Angeles cannot be held liable under § 1983. Monell v. Dep't of Social Servs., 436 U.S. 658, 690-91 (1978).

AFFIRMED.[2]

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[1] To the extent defendants failed to plead issue preclusion as an affirmative defense, we may consider the issue sua sponte where, as here, the parties have been provided an opportunity to be heard on the issue. See Clements v. Airport Auth. of Washoe County, 69 F.3d 321, 330 (9th Cir. 1995).

[2] Defendants also contend that they are entitled to testimonial immunity. We do not reach this contention.